IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

FAO.No. 219 of 2005()

AS.6/2000 of SUB COURT, HOSDRUG
OS.553/1997 of MUNSIFF COURT, HOSDRUG

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APPELLANT/RESPONDENT/PLAINTIFF

A.L.THOMAS, AGED 54 YEARS, S/O.LUCA,
HIGH SCHOOL ASSISTANT, RAJAPURAM, KALLAR VILLAGE,
HOSDURG TALUK, KASARGOD DISTRICT.

BY ADV. SRI.T.K.VIPINDAS

RESPONDENTS: RESPONDENTS/APPELLANTS/DEFENDANTS 1 TO 4

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1. THE STATE OF KERALA REPRESENTED BY THE
DISTRICT COLLECTOR, KASARGOD.

2. THE ASSISTANT AGRICULTURAL DIRECTOR,
KANHANGAD, BALLA VILLAGE, HOSDURG TALUK,
P.O KANHANGAD.

3. THE AGRICULTURAL OFFICER, PANATHADY
KRISHI BHAVAN, RAJAPURAM, KALLAR VILLAGE,
HOSDURG TALUK, KASARGOD DISTRICT P.O RAJAURAM.

BY GOVT. PLEADER SRI.L.G.SURESH BABU

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 18/08/200 THE COURT ON 20/08/2007 PASSED THE FOLLOWING:

ORDER IN I.A. NO. 2935 OF 2005 IN F.A.O NO.219 OF 2005

DISMISSED

20-08-2005 SD/- K.PADMANABHAN NAIR, JUDGE

ORDER IN I.A. NO. 962 OF 2006 IN F.A.O NO. 219 OF 2005

DISMISSED

20-08-2005 SD/- K.PADMANABHAN NAIR, JUDGE

K.PADMANABHAN NAIR, J.

F.A.O No. 219 of 2005

Dated this the 20th day of August 2007

JUDGMENT

The plaintiff in O.S. 553 of 1993 on the file of the Munsiff Court Hosdurg is the appellant. The appeal is filed against the order passed by the lower appellate court by which it set aside a decree and judgment passed by the trial court and remanded the suit for fresh disposal.

2. The appellant was the Secretary of a committee by name 'Rajapuram Community Irrigation Works Committee'. The Agricultural Department organised a scheme of Community Irrigation for the development of coconut cultivation in the State. Respondent Nos 2 &3 were the officers holding the charge of the Community Irrigation Programme in the Panathadi Panchayath. The respondents sanctioned one of such projects for Rajapuram area which envisages digging of ponds and installation of pump set for irrigation of coconut palms in the neighbouring plots. On 13-3-1995 respondents obtained the written consent of the land owner i.e the Rajapuram Holy Family Forane church , for digging pond in the property owned by the church. The appellant undertook the construction of pond under the said scheme and has to complete it within a time limit . The work was not completed within the time limit prescribed in the agreement. During the currency of the agreement the appellant received as advance an amount of Rs.50,000/-

According to the appellant he spent 35,000/- for the digging the pond and also collected 15 loads of granite stones in the work spot by spending more than Rs.15,000/- He contended that he had already spent a total amount of Rs.50,000/-. It was also contended that the appellant could not proceed with the work as the church revoked the consent, It was averred that this fact was brought to the notice of the 3rd respondent under Ext.A3 letter sent by the appellant on 18-6-1996. The appellant alleged that the respondents were attempting to recover the advance of Rs.50,000/-.and they had no right to recover the same. The respondents filed a joint written statement contending that the suit was not maintainable. The contention that the appellant spent Rs.35,000/- for digging the pond was denied. The averment that the collected 15 loads of granite stones worth Rs. 15,000/- also was denied. The contention that he was unable to complete the work because of revocation of consent by the land owner was also denied. It was specifically contended that the appellant did not spend any amount for digging the pond though he received Rs.50,000/- in advance. It was contended that the Government had sanctioned an amount of Rs. 1,99,000/- and decided to construct a pond having measurement of 15 x 12 , 5 x 2 with 9 meters depth and also to construct a ground level tank, Pump house, and supplying pipe lines. . It was also contended that a meeting of the beneficiaries was held and decided to collect Rs.1,000/-

each from the beneficiaries and to deposit the same in joint account of Convenor and Agricultural Assistant, Kanhangad. The appellant was selected as the convenor of the committee on 13-3-1995. The appellant submitted a consent letter to the Krishi Bhavan on 18-2-1995. A meeting was held and collected Rs.12,500/- An amount of Rs.10,000/- was deposited in the Sub-treasury,Hosdurg on 4.4.1995. The balance amount of Rs.2,500/- was entrusted with the appellant.. The appellant applied for Rs.50,000/- as advance and cheque for Rs.50,000/- was issued by the Agricultural Assistant Director in favour of the appellant on 23.5.1995 It was contended that the appellant did not care to convene a meeting of the beneficiaries or started the construction of the project and he misappropriated the entire amount of Rs. 50,000/- . It was contended that the 3rd respondent issued a notice to the appellant calling upon him to finish the work before 31.12.1995.. It was also contended that on 7-11-1995 the 2nd respondent demanded a progress report of the project from the 3rd respondent and on 5-2-1995 the 2nd respondent submitted a report and stated that the appellant did not spent even Rs.2,000/- for construction. So the 2nd respondent demanded the appellant to execute the work. It was specifically contended that the appellant did not start the work. On 9-2-1996 the 3rd respondent issued another notice calling upon him to finish the work on or before 15-2-1996 or to refund the advance amount with 10% interest, in the light of the complaint made

by 4 beneficiaries. that there was no progress in the construction work. A meeting of beneficiaries and ward members was convened on 31-5-1996, and instructed the appellant to begin the construction work of the pond. It was contended that on 10-2-1997 the Assistant Director of Agriculture send a registered notice calling upon the appellant to inform the progress of the work and receive the balance amount. The appellant sent reply stating that the digging of pond was already over and what remains was only side fitting and he wanted to revise the estimate. A meeting of the beneficiaries was convened who expressed dissatisfaction towards the conduct of the appellant. On 9-5-1997 the appellant wrote a letter that he was a diabetic patient and he was not in a position to continue the work. On 2.6.1997 10 beneficiaries submitted a memorandum to the Agricultural Minister and he forwarded the same to the Krishi Bhavan. On 11.9.1997 and 29.11.1997 the 2nd respondent issued notices to the appellant to re-deposit the advance amount. . He did not oblige. It was contended that the entire averments in the plaint were false and the appellant misappropriated the government fund and approached the court with a false complaint. It was also contended that there was a valid agreement with the appellant and the respondents and appellant committed breach of agreement.

3. The trial court decreed the suit. Challenging that decree and judgment the respondents filed A.S 6/2000 before the Subcourt

Hosdurg. The lower appellate court set aside the decree and judgment and remanded the case for fresh disposal in accordance with law and directed the trial court to obtain a fresh Commission report in respect of the pond situated in the property of the Rajapuram Church. Both sides were given liberty to adduce further evidence.

4. Challenging the order of remand the appellant has filed this First Appeal from Order. There are certain admitted or proved facts. The respondents sanctioned the project of digging pond in the Rajapuram area . They obtained a written consent from the Rajapuram Holy Family Forance Church on 13-3-1997 for digging a pond in the property of the church. Thereafter a committee was formed, by name Rajapuram Community Irrigation Works Committee headed by the appellant who was working as a High School Assistant in the Holy Family High School Rajapuram . The materials on record show that an agreement was entered into between the appellant and the respondents on 31-3-1995. The appellant undertook the construction work to be completed on or before 15-4-1996. Admittedly the work was not completed. According to the appellant he had spent 35000/- for digging the pond and had collected 15 loads of granite stones According to the appellant he was unable to complete the work since the land owner withdrew the consent under Ext.A8. Ext.A8 reveals that the church spent Rs.15,000/- for the digging of said pond and it was decided to collect the said amount of Rs. 15,000/-

from the appellant. He was asked to issue a post dated cheque so as to enable the church to collect the amount on or before 31-12-1996. PW2 examined by the appellant himself had stated that appellant did not issue a cheque as demanded by the church and hence they prevented the appellant from doing the work after 31-12-1996 So the work was obstructed because of the fact that the appellant did not reimburse the amount spent by the church. If he had paid the amount the church would not have withdrawn the consent. So the stand taken by the appellant that he was unable to complete the work because of the withdrawal of the consent by the Church was not correct.

5. The next question arising for consideration is whether the finding of the trial court that appellant had spent more than Rs.50,000- is correct. In the plaint the specific case put forward by the appellant was that he spent Rs.35,000/- for digging the pond and collected granite stones for 15,000/-. So as per the averment in the plaint the actual amount spent by the appellant was Rs. 35,000/- The appellant produced Ext.A4 series to prove his contention. The total amount covered by Ext.A4 series more than Rs.72,000/- The persons who issued receipt were not examined. But the trial court relied on the receipts. The appellant had filed an application to depute a commissioner. A commissioner was appointed. The only request made in the commission application was to note whether any granite stones were stored in the property The Commissioner

did not give notice to the respondents and visited the place and prepared the report in the presence of the appellant alone though there was no urgency at all. The Commission report reveals that the pond is situated about 15 meters away from the southern side of a puramboke. The commissioner noted that about 15 loads of granite stones are collected on the side of road . The pond was situated in a rocky terrain and it is constructed by drilling granite rock till the bottom of the same. No traces of soil was noticeable on the sides of the pond. On the southern and western sides of the pond, there was a side packing by two layers of chisled laterite stones. The commissioner estimates the expenses for digging the pond at Rs.50,000/- It is not discernible from the commission report that on what basis the commissioner has come to such a conclusion regarding the estimate expenses. Further the commission report was prepared by the commissioner without issuing notice to the affected parties. It is trite law that such a report has no evidentiary value at all. The commission was not examined. So the reasoning of the lower appellate court that no reliance can be placed on Ext.C1 is perfectly correct. it is true that the respondents filed a petition for deputing a commissioner before Lower Appellate Court on the ground that the pond which the Commissioner inspected was situated in some other property. For that purpose the respondents had relied on the evidence of PW2. and the averments in the plaint. The materials on record shows that the

pond situated in the property of the church is a mud pond.. So the lower appellate court rightly held that it is necessary also to locate the pond situated in the property of the church. There is no material to prove that the appellant had spent more than Rs. 50,000/-. The lower appellate Court gave an opportunity to the plaintiff to prove the fact that the pond is actually situated in the property of the church by taking out a fresh commission . The Commissioner should be assisted by an expert to find out whether any work was done for digging the pond in the property of the church and where exactly the alleged pond is situated. So I do not find any reason to interfere with the order of remand. No questions of law arise for consideration in this appeal . So the appeal is only to be dismissed.

6. In the result the appeal is dismissed But there will be a direction to the trial court to decide the suit based on the material and evidence adduced before it untrammelled by any observations made by the lower appellate court in its judgment or in this judgment

K.PADMANABHAN NAIR,JUDGE

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